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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Christina Elwell, Plaintiff, v. GOOGLE, INC. and TIMOTHY ARMSTRONG, Defendants.	ECF CASE Case No: 05-CV-06487 (DLC) **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' REPLY BRIEF AND DECLARATION**

Defendants' Reply brief was timely filed pursuant to the Federal Rules of Civil Procedure. Local Rule 6.1(b)(3) states that reply briefs must be filed within five business days after the service of the answering papers. Federal Rule 6(e) provides for *three additional days* if service of the answering papers is made pursuant to Rule 5(b)(2)(D) (electronically). Federal Rule 6(a) provides that intermediate Saturdays and Sundays are excluded in the computation of time when the prescribed period is shorter than eleven days.

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Plaintiff's Opposition was filed electronically on September 14, 2005. Thus, pursuant to Local Rule 6.1(b)(3) and Federal Rules 5(b)(2)(D) and 6(a), Defendants' Reply brief was not due until September 26, 2005. Accordingly, Plaintiff's Motion to Strike must be denied.

It is unfortunate that Plaintiff's papers continue to be abrasive and aggressive in tone. Equally dismaying is Plaintiff's use of an unfounded timeliness issue to file what amounts to be sur-reply addressing substantive points made in Defendants' Reply. Although Plaintiff contends that Defendants "thumb[ed] their noses at this Court's rules," it is Plaintiff who has blatantly disregarded the rules by filing a sur-reply without leave of court. Travelers Inc. Co. v. Buffalo Reinsurance Co., 735 F. Supp. 492, 495 (S.D.N.Y 1990), vacated in part on other grounds, 739 F. Supp. 209 (S.D.N.Y. 1990) (sur-reply shall not be accepted without prior leave of the court). In addition to being procedurally unauthorized, Plaintiff's sur-reply lacks substantive merit.

Plaintiff takes issue with the fact that Defendants submitted the actual "Code of Conduct" that was in place at the time of the events on which Plaintiff's Complaint is based, arguing that a motion to dismiss must be decided on the pleadings alone. However, Defendants' motion is to dismiss *and* to compel arbitration. There is no basis to exclude extrinsic evidence in considering a motion to compel arbitration. To the contrary, by its very nature, this issue requires the consideration of documents outside of the Complaint to determine whether the parties agreed to arbitrate the issues raised. This Court has, in the past, looked beyond the face of the Complaint when ruling on motions to compel arbitration. See Vaughn v. Leeds, Morelli & Brown, P.C., No. 04 Civ. 8391 (DLC), 2005 WL 1949468 (S.D.N.Y. Aug. 12, 2005). Moreover, Plaintiff's protests ring hollow since she failed to raise this objection in her Opposition even though Defendants' motion to compel arbitration introduced the underlying arbitration agreement.

Next, Plaintiff makes the calumnious statement that Defendants have "actively misled the Court" by citing the Code of Conduct that was in place at the time of the events at issue. Nothing could be further from the truth. Defendants submitted the actual Code of Conduct that governed Plaintiff's behavior at the time, since it is that Code of Conduct by which Plaintiff's behavior will be judged. To avoid any dispute over this manufactured issue, Defendants now submit, as Exhibit A to this Opposition, the earlier version of the code of conduct that was attached to Plaintiff's Employment

Agreement. As the Court will note, this version is even more supportive of Defendants' contentions that Plaintiff's workplace behavior implicated the Employment Agreement. As one example, this document prohibits all employees from "[e]ngaging in any conduct which is not in the best interest of the Company." (¶ 13). Plaintiff's threats to take the position that Google offered her and "fuck it up," "make life difficult" for Google and join Yahoo, Google's competitor, certainly implicate the terms of this policy, which is specifically referenced in Plaintiff's Employment Agreement.

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiff's Motion to Strike.

Dated: October 3, 2005

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By: /s/

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